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No. 836

In The Supreme Court of the United States

OHIO POWER COMPANY,

Plaintiff-Respondent,

vs.

DORIS M. BROWN, et al.,

Defendant-Petitioner

Defendant-Petitioner's PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF OHIO

DORIS M. BROWN,
1604 Gray Street,
Findlay, Ohio,
Defendant-Petitioner,
In Propria Persona.

RALPH D. COLE, JR.
324 Ohio Bank Building,
Findlay, Ohio

LARRY R. BROWN,
ROBERT E. LEVITT,
1110 First National Bank Building,
Canton, Ohio,
Attorneys for Plaintiff-Respondent.

MILLSTREAM PRESS, 130 N. MAIN STREET, FINDLAY, OHIO

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No.....

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..... Term, 19 ....

OHIO POWER COMPANY
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vs.

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Defendant-Petitioner.

Defendant-Petitioner's PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF OHIO

To the Honorable Supreme Court of the United States:

The petition of Doris M. Brown respectfully asks for a writ of certiorari directed to the Supreme Court of the State of Ohio, the court in which the record of this cause is now lodged and shows that this action was commenced in the Court of Common Pleas of Hancock County, Ohio, by Ohio Power Company, Plaintiff, vs. Doris M. Brown, et al., Defendants, to appropriate land for an easement. The verdict of the jury, while in excess of the compensation offered by Ohio Power Company, was deemed to be a one-third interest of the property rather than a ruling on damages and compensation to the entire property. This was November 26, 1962, Case Number 32725.

Objections were raised by the defendants to make definite and certain the interest of Doris M. Brown who was also sued as an administratrix of the estate. A request for an unbiased judge and the fact two of the defendants did not receive due process in notice were also raised.

The decision was appealed to the Third District Court of Appeals on eight assignments of error by the defendants. The Court ruled upon two, (App. A), that the defendants did not have a fair trial, in their opinions (App. A).

Plaintiff then appealed to the Supreme Court of Ohio on the issues if the affidavit of prejudice was timely filed, in ruling the trial judge had no authority to hear the cause, in denying a rehearing, and in reversing the trial court decision. The Supreme Court of Ohio claimed to have reversed the decision of the Court of Appeals, (App. B).

November 4, 1964, judgment of the Supreme Court of Ohio was entered. This judgment by the highest court of the State, in this cause contravenes Section 1, of Article XIV of the Constitution of the United States, (App. C), and Amendment to the Constitution, Article V, (App. D), and is repugnant thereto. It is the prayer of this petitioner that the Supreme Court of the United States consider these wrongs and correct them.

The question arising from the decision of the Supreme Court of Ohio is that this Court had no jurisdiction to consider a pleading that the defendant's affidavit was frivolous and a sham. The issue had never been raised in any lower court and was not a part of the record. The defendant had never been given the opportunity to properly show her reasons or state her case, and no hearing was held on the affidavit except just before trial by the trial judge. The defendant could not protect her rights in the appellate jurisdiction of the Supreme Court of Ohio where the issue of frivolous or sham pleading originated.

The Supreme Court of Ohio did not rule on the same

issues the Court of Appeals judged and certainly they could not rule on an affidavit of prejudice two years after the cause was heard, which affidavit would have been considered by a past Chief Justice, it would be difficult to know how he might have ruled.

The decision we should pay Common Pleas Court costs in an appropriation in which we received more compensation than the plaintiff offered, would seem to be repugnant to Article V of Amendments to the Constitution of the United States. (App. D.)

The defendants failed to receive a printed record and some form of brief, supplemental or amended, which was apparently filed after the original brief and which appeared in oral argument in the Supreme Court of Ohio. The contents are not yet known.

Six issues remain in the Court of Appeals to be heard, so it would have been proper for the Supreme Court to return the case to that court rather than the Common Pleas Court.

The Constitutional rights of the defendants have been argued in all courts and the issue of the unconstitutional effects of the frivolous and sham pleading issue was argued in the defendant's brief and in oral argument to the Supreme Court of Ohio. The decision of the Supreme Court of Ohio is probably not in accordance with the decisions of the Supreme Court of the United States and certainly not in accordance with the Court of Appeals, nor in accordance with the Constitutional rights of this petitioner. The reversal of the decision of the Court of Appeals by the Supreme Court is not apparent from the record. It is apparent the Supreme Court of the State of Ohio has so far departed from the accepted and usual course of judicial proceedings as to call for the exercise of the power of supervision of the Supreme Court of the United States.

Your petitioner believes the judgment of the Supreme

Court in this cause is erroneous as herein set forth as appears from said transcript of the record and proceedings, and that this honorable court ought to require this cause to be certified to it for review, consideration, and final determination, as provided by law.

Wherefore your petitioner respectfully prays that a writ of certiorari may be issued out of and under the seal of this court directed to the Supreme Court of the State of Ohio commanding said court on a day certain to be named a full and complete transcript of the record and all proceedings of the said Supreme Court of the State of Ohio in this cause, to the end that the judgment may be reviewed, considered and determined as provided by law, and that this honorable Court may correct the errors complained of herein by your petitioner and reverse said judgment of the Supreme Court of the State of Ohio, and remand said cause, and grant such other and further relief as from the nature of this case your petitioner may be entitled in pursuance to law.

Doris M. Brown

DORIS M. BROWN, *Petitioner*

RALPH D. COLE, JR.,
324 Ohio Bank Building,
Findlay, Ohio,
LARRY R. BROWN,
ROBERT ~~E. BROWN~~ LEVITT,
1110 First National Bank Building,
Canton, Ohio,
Attorneys for Plaintiff-Respondent

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1604 Gray Street,
Findlay, Ohio,
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APPENDIX A.

Journal Entry of the Court of Appeals, September 10, 1963

On consideration of this appeal on questions of law, the Court finds that the Trial Court committed error prejudicial to the Defendants in overruling the Affidavit of Prejudice and Bias filed by the defendant, Doris M. Brown, and also finds that the lower Court committed error prejudicial to the Defendants in proceeding to hear and to submit to the Jury this cause and enter Judgment on the Verdict while said Affidavit was on file and the qualifications of the Judge remained undetermined.

Wherefore, it is ordered that the judgment be and is hereby reversed and the case remanded to the Court below for further proceeding. Cost to follow final determination of the cause. Exceptions saved to all parties.

GEORGE S. MIDDLETON,
Judge, Court of Appeals,

RAYMOND A. YOUNGER,
Judge, Court of Appeals,

J. THOMAS GUERNSEY,
Judge, Court of Appeals.

(Approval ommitted)

Opinion of the Court of Appeals

MIDDLETON, P. J.

This is an appeal on questions of law from the judgment of the Common Pleas Court finding the amount of compensation to be paid by the plaintiff to the defendant for easement rights taken in appropriation proceedings. One of the appellant's assignments of error is that the Court erred in overruling the affidavit of prejudice filed by the defendant, Doris M. Brown, on the ground that the affidavit was not timely filed. Revised Code Section 2701.03 provides in part as follows:

> "When a judge of the court of common pleas * * * has a bias or prejudice either for or against, a party * * * on the filing of an affidavit * * * setting forth the fact of such * * * bias, prejudice, * * * the clerk of the court of common pleas shall enter the fact of such filing on the on the trial docket in such cause and forthwith notify the chief justice of the supreme court * * *. Such affidavit shall be filed not less than three days prior to the time set for the hearing in such matter or cause * * *."

On November 23, 1962, Doris M. Brown, defendant herein, filed an affidavit of prejudice and bias against the Honorable Dan Batt, assigned as Judge of the Court of Common Pleas of Hancock County to hear this cause. In her affidavit she states that she did not know and could not have known that the case would be assigned before said Judge until November 23, 1962. The record discloses that this cause first, came on for hearing on preliminary matters before the Honorable Joe M. Moorhead, the resident Judge on October 24, 1962. On November 26, 1962, when the cause came on for hearing before the Honorable Dan Batt, Judge of said Court by assignment, the Court stated:

> "The record may show that an affidavit of prejudice or interest of judge was filed November 23rd and it is the

feeling of the Court that it was not timely and therefore it is the opinion of the Court that a jury having been summoned and all the witnesses being present, attorneys present, plaintiff present, and all parties present, we should proceed."

As noted Revised Code Section 2701.03 provides an affidavit of prejudice shall be filed not less than three days prior to the time of the hearing of said cause. As hereinbefore stated, the affidavit of prejudice, as shown by the record, was filed November 23, 1962, with the Clerk of the Court of Common Pleas and the hearing before Judge Batt was November 26, 1962, which was "not less than three days prior to the time set for the hearing of said cause." The Court finds that the overruling of the defendant's affidavit for the reason that it was not timely filed was error and prejudical to the defendant.

Upon the overruling of the affidavit of prejudice the Judge proceeded to hear the cause and the conclusion of the hearing entered judgment upon the verdict.

In Wolf, et al. v. Marshall, et al., 120 Ohio St., 216, at page 219, it is stated in the opinion that upon the filing of an affidavit of prejudice and bias the trial judge is without authority to proceed further with the trial and enter judgment therein; that the judgment so rendered must be held to be a nullity and reversed.

In the case of Wendel, County Treas., v. Hughes, 64 Ohio Appellate, 310, the Court of Appeals of Butler County, on the authority of Wolf v. Marshall, supra, held "A judge against whom an affidavit of bias and prejudice has been filed is without authority to hear the case so long as the affidavit is on file and the issue of disqualification thereby raised remains undecided."

The Court of Appeals of Fayette County in the case of Tumbleson v. Noble, 109 Ohio Appellate, 242, passed upon

the same question and held that the mere filing of an affidavit of bias and prejudice against a judge does not of itself disqualify the judge; there must be a hearing and determination of the bias or prejudice by the Chief Justice of the Supreme Court; that as long as such affidavit is on file and the issue of disqualification of the judge remains undetermined, he is without authority to determine the cause or hear any matter affecting the substantive rights of the parties.

This Court is in accord with the above views. Attention is directed to the majority opinion of Judge Zimmerman and the dissenting opinion of Judge Taft in the case of State ex. rel. vs. Weygarndt, 164 Ohio St., 463, for a full discussion of the constitutional, statutory and case law involved upon the filing of an affidavit of bias or prejudice pursuant to the provision of Revised Code Section 2701.03. In the instant case upon the filing of the affidavit of prejudice the trial court was without authority to proceed further with a hearing in said cause so long as the affidavit of prejudice remained undisposed of and the judgment rendered on the hearing is a nullity and must be reversed.

In view of the above holding the Court does not rule upon the other assignments of error.

For the reasons herein stated the judgment is reversed and the cause remanded for further proceedings.

YOUNGER, J., and GUERNSEY, J., concur.

APPENDIX B.

Journal Entry of the Supreme Court of Ohio

November 4, 1964

Case No. 38453

Per Curiam. The only basis of prejudice alleged by defendant Doris M. Brown in her affidavit is that the trial judge had a prejudice against her because of his membership in the Ohio State Bar Association. There is no other fact of prejudice alleged. There is no allegation that the judge ever knew such defendant. She claims that to secure justice she must have an assignment of a judge who was not a member of the Ohio State Bar Association in 1955 or 1956.

It cannot be seriously contended that merely because a judge is a member of the Ohio State Bar Association he has a prejudice against a person he does not even know. The affidavit is frivolous and a sham. If it had been submitted to the Chief Justice for consideration, as the statute then required, the Chief Justice would have been under a mandatory duty to overrule it. See State, ex. rel. Turner, v. Marshall, Chief Justice, 123 Ohio St., 586. Hence, although the trial judge had no authority to rule upon that affidavit, his action in overruling it was not prejudicial to defendant.

The Court of Appeals was in error in reversing the judgment of the trial court.

The judgment of the Court of Appeals is reversed, and final judgment is rendered for appellant.

Judgment reversed.

TAFT, C. J., ZIMMERMAN, MATTHIAS, O'NEILL, GRIFFITH, HERBERT and GIBSON, J.J., concur.

APPENDIX C

Constitution of the United States

ARTICLE XIV, Section 1: "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the the United States, nor shall any State deprive any person of life, liberty, or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws."

APPENDIX D

Constitution of the United States

AMENDMENT TO THE CONSTITUTION, ARTICLE V: "No person shall be held to answer for a capital or other infamous crime unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the militia, when in actual service, in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal cases to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use without just compensation."